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No. 84-5872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROY E. DANIELS,

Petitioner,

v.

ANDREW WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that a state may constitutionally deny a prison inmate any remedy for physical injuries suffered as a result of the negligence of a state prison employee, regardless of the seriousness of the injuries suffered, and in holding that a prisoner has a constitutionally protected interest only in his tangible property, not in his body?

2. Did the court of appeals err in holding that, even were it to find that a prisoner has a constitutionally protected interest in his body, this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), extends to liberty as well as property interests and bars a suit under 42 U.S.C. § 1983 for damages by a prisoner alleging injuries as a result of the negligence of a state prison employee as long as a state remedy exists?

3. Did the court of appeals err in holding that a meaningful state remedy, as required by this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), was available to a state prisoner who alleged personal injuries resulting from the negligence of a state prison employee where the employee relied on a defense of sovereign immunity, the employee declined to abandon that defense before the *en banc* court of appeals, and the court of appeals could not guarantee that sovereign immunity would not, in fact, bar the prisoner's recovery in state court?

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PROCEEDINGS BELOW

The United States District Court for the Eastern District of Virginia held that petitioner was barred from proceeding in this civil rights suit as a result of this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). Its memorandum opinion is unreported, but is set forth in the Joint Appendix (J.A.) at pages 19-20. A panel of the United States Court of Appeals for the Fourth Circuit affirmed. The opinion is found at 720 F.2d 792 (4th Cir. 1983) and in the Joint Appendix at pages 22-31. By a divided vote, an *en banc* court of appeals also affirmed the district court. The *en banc* opinions are reported at 748 F.2d 229 (4th Cir. 1984) and are included in the Joint Appendix at pages 32-44. This Court granted a writ of certiorari on February 19, 1985.

JURISDICTION

Petitioner brought this action under 42 U.S.C. § 1983, with jurisdiction grounded in 28 U.S.C. §§ 1331 & 1343(3). He appealed the district court's dismissal of his action pursuant to 28 U.S.C. § 1292. He petitioned for certiorari to this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The facts of this case are simple. Roy Daniels, petitioner, was a prisoner in the Richmond city jail on January 23, 1982. (J.A. 6). He claims that on that day he slipped and fell on a pillow and newspapers negligently left by the respondent on stairs which Daniels used. (J.A. 6). Petitioner brought an action against respondent under federal law to avoid respondent's sovereign immunity defense in state court.

Petitioner alleged in his suit that he injured his back and his ankle when he fell and that the injuries were caused by respondent's negligence. The lower courts found that petitioner could not proceed with his federal action, even assuming that he could prove what he alleged.

The United States District Court for the Eastern District of Virginia held that this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), barred a federal action, since petitioner could proceed with his negligence claim in state court. (J.A. 20). A panel of the United States Court of Appeals for the Fourth Circuit agreed (J.A. 31), but the court of appeals granted a rehearing *en banc*. Following reargument, a majority of the panel reaffirmed the conclusion that petitioner could not proceed with his federal action, but the majority reached its result through a very different analysis from the one used by the district court and the panel. (J.A. 35).

The majority of the court of appeals decided three separate issues against petitioner: First, a 5-4 majority found that the Commonwealth of Virginia would not violate petitioner's Fourteenth Amendment rights if it denied him an opportunity to seek a meaningful remedy against a state officer whose negligence resulted in injuries, even serious ones, to petitioner's body. This majority reasoned that an injury to a prisoner's person, no matter how serious, does not require the meaningful post-deprivation remedy that this Court found necessary following a $23.50 negligence-based property loss in *Parratt* v. *Taylor*. Second, the *en banc* court unanimously agreed that, even if a prisoner is entitled to some remedy for personal injuries attributable to the negligence of state officials, *Parratt* v. *Taylor* would apply to deprivations of liberty in the same way it applied to deprivations of property. Thus, *Parratt* v. *Taylor* would bar Petitioner's claim if he had a meaningful post-deprivation remedy in state court. Third, a 6-3 majority of the *en banc* court held that petitioner had a meaningful remedy in state court, despite the fact that respondent, who was represented in the brief in the court of appeals by the Attorney General of Virginia, asserted that he would rely in both state and federal court upon sovereign immunity. (J.A. 51).

SUMMARY OF THE ARGUMENT

The lower courts are confused as to when 42 U.S.C. § 1983 is available as a remedy for persons who claim that they have suffered physical injuries or property damage as a result of wrongful actions by officials acting under color of state law. The confusion surrounds several questions: May a complaint that alleges a negligent act by a person acting under color of state law state a claim under 42 U.S.C. § 1983? If so, does it matter for purposes of 42

U.S.C. § 1983 whether the negligent act injures liberty or property interests? When is a state remedy sufficiently "meaningful" to satisfy the demands of the Fourteenth Amendment so that an action under 42 U.S.C. § 1983 is barred?

Petitioner believes that the legislative history of 42 U.S.C. § 1983 and this Court's construction of the statute support four arguments. He believes that if these arguments are accepted, much of the current confusion surrounding § 1983 will dissipate as lower courts will have clearer guidance as to the scope of the statute, and the relationship between state and federal courts envisioned when § 1983 was adopted will be restored.

First, petitioner argues that § 1983 envisions that actions like his should be heard in state courts and that as long as state courts are prepared to protect persons who are in the state's custody § 1983 should not be read to create a cause of action for simple torts. In this argument petitioner urges that the Court accept neither a distinction between liberty and property interests nor a distinction between intentional and negligent torts.

Instead, petitioner suggests that a line be drawn between constitutional claims arising at the moment that an official acts and constitutional claims arising only when no remedy is provided by the state following official action. The first category of claims always would be actionable under 42 U.S.C. § 1983, but the second category would give rise to a cause of action only where a state failed to provide the constitutionally required remedy.

Second, petitioner asks this Court to recognize that liberty interests may arise under the Constitution or laws of the United States whereas property interests often are created by state law. Although petitioner urges that both

liberty and property interests generally should be treated alike insofar as 42 U.S.C. § 1983 is concerned, he asks this Court to recognize that federal courts are not limited to an examination of state law when they are asked to decide whether a liberty interest exists in any given case involving actions by state officers.

Third, petitioner urges that a state remedy is not sufficiently meaningful to satisfy the demands of the Fourteenth Amendment where the state has established a bar to suit in state court that effectively negates any state cause of action to remedy a deprivation of liberty or property. Thus, a bar to suit in state court that is too broad leaves the doors of federal courts open to suits brought under 42 U.S.C. § 1983.

Fourth, it is important that there be a clear rule for determining early in a case whether a state remedy is sufficiently meaningful to satisfy the demands of the Fourteenth Amendment so that an action under § 1983 will not be permitted. Without a clear rule, litigants will litigate simultaneously in state and federal court and waste the resources of both courts. The result of uncertainty is not only to delay remedies for deprivations or liberty and property, but also to delay the prompt disposition of litigation and to impair the efficiency of state and federal judicial systems. A workable rule should provide that a federal court will entertain a prisoner's action alleging a negligent or intentional deprivation of liberty or property by an official acting under color of state law where: that official invokes a sovereign immunity defense; he or she is afforded an opportunity to withdraw the defense, but insists upon maintaining it; and the state has not provided an immediate and final means for a plaintiff to establish that the defense is unavailable.

ARGUMENT

I. A STATE MAY NOT CONSTITUTIONALLY DENY A PRISON INMATE A REMEDY FOR PHYSICAL INJURIES SUFFERED AS A RESULT OF THE NEGLIGENCE OF A STATE PRISON EMPLOYEE, REGARDLESS OF THE SERIOUSNESS OF THE INJURIES SUFFERED, SINCE A PRISONER HAS A CONSTITUTIONALLY PROTECTED INTEREST IN HIS BODY AS WELL AS IN PROPERTY THAT HE IS PERMITTED BY THE STATE TO POSSESS.

A. Some Claims Arise Under 42 U.S.C. § 1983 The Moment A State Official Acts While Others Arise Only If The State Fails To Provide A Remedy For Injuries Suffered As A Result Of Intentional Or Negligent Acts By State Officers.

The most familiar type of claim brought under 42 U.S.C. § 1983 is illustrated by one of the most important cases this Court has decided in construing the statute, *Monroe* v. *Pape*, 365 U.S. 167 (1961). The plaintiffs claimed that the invasion of their home and the subsequent search without a warrant and the arrest and detention of Mr. Monroe without a warrant and without arraignment constituted a deprivation of their "rights, privileges or immunities secured by the Constitution' . . . ." *Id.* at 170. This Court held that a claim was stated under the statute even though the defendants might have acted in violation of state law.

Monroe illustrates the typical claim that officials acting under color of state law deprived the plaintiffs of rights, privileges or immunities arising under the Constitution or the laws of the United States at the moment the officials acted. The *Monroe* complaint alleged violations of the Fourth and Fourteenth Amendments that occurred at the time the officers entered the house, searched and detained Mr. Monroe. This Court has confronted a host of

similar claims in which plaintiffs alleged that at the time officials acted they violated federal law. See, for example, *Perry* v. *Sinderman*, 408 U.S. 593 (1972), where a college teacher alleged that the decision not to rehire him was based on his exercise of First Amendment rights; *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), where the plaintiff alleged that her employer had discriminated against her on the basis of her race and sex; *Tower* v. *Glover*, ___ U.S. ___, 104 S.Ct. 2820 (1984), where the plaintiff alleged a conspiracy on the part of public defenders who represented him in criminal proceedings and various public officials.

Many of the cases in which this Court has rejected claims raised under § 1983 also involve allegations that officials violated federal law at the moment they acted. See, for example, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), where a college teacher alleged that officials violated the First Amendment and denied him procedural due process in deciding not to renew his contract; *Paul* v. *Davis*, 424 U.S. 693 (1976), where police chiefs distributed "flyers" of "active shoplifters" bearing the plaintiff's picture; *Procunier* v. *Navarette*, 434 U.S. 555 (1978), where a state prisoner alleged that prison officials had negligently interfered with his mail; *Baker* v. *McCollan*, 443 U.S. 137 (1979), where the plaintiff was an innocent man who had been arrested pursuant to a facially valid warrant; *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), where plaintiffs alleged that police officers had perjured themselves in their testimony in state criminal trials.

In all of these cases, the Court assumed that if the defendant officials violated federal law when they acted, the plaintiff was entitled to pursue an action under 42 U.S.C. § 1983, notwithstanding the availability of state remedies. When the Court found that plaintiffs were not

entitled to prevail, it either held, as in *Roth*, *Paul*, and *McCollan*, that no liberty or property interest protected by the Constitution or laws of the United States had been violated or, as in *Navarette* and *Briscoe*, that an immunity from suit barred the action.

The Court took a very different approach in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). The plaintiff, an inmate at a Nebraska prison, had ordered certain hobby material by mail. It was valued at $23.50. Because the plaintiff was in segregation and was not permitted to have the hobby kit with him, prison officials held the kit for him. When the plaintiff was released from segregation, he found that the kit was missing and brought an action in federal court to recover damages for the negligent loss of his property.

Writing for the Court, Justice Rehnquist reasoned that

> [b]oth *Baker* v. *McCollan* and *Monroe* v. *Pape* suggest that § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution of the United States. (451 U.S. at 527).

The Court had no difficulty in finding that the defendants in *Parratt* acted under color of state law, since they "were, after all, state employees in positions of considerable authority." *Id.* at 535-36. The second question was more difficult, however, since the plaintiff had alleged no violation of a specific right, privilege, or immunity, but had relied generally on the Due Process Clause. 451 U.S. at 536.

The Court examined its prior decisions on the scope of the Due Process Clause and found that decisions requiring pre-deprivation hearings were not feasible in the context of a negligent deprivation of property. *Id.* at 538-41. Ultimately, the Court concluded that Taylor failed to allege a violation of the Due Process Clause, because "[a]lthough he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure" and "the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation." *Id.* at 542. The Court found that the state remedy was adequate even though it might not provide all the relief available under § 1983. *Id.* at 544. The Court expressed some concern at the conclusion of its opinion that too broad a reading of § 1983 might turn every accident involving a state official into a federal cause of action. *Id.*

Three terms later this Court considered *Hudson* v. *Palmer*, ___ U.S. ___, 104 S.Ct. 3194 (1984). Palmer, an inmate at a Virginia prison, sued in federal court to challenge *inter alia* "shakedown" searches and the destruction of his property during the searches. Chief Justice Burger wrote for the Court as it held that the *Parratt* reasoning "applies as well to intentional deprivations of property." 104 S.Ct. at 3203. Thus, "[i]f negligent deprivations of property do not violate the Due Process Clause because predeprivation process is impracticable,[1] it follows that intentional deprivations do not violate that

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[1] Between its decisions in *Parratt* and *Hudson*, the Court decided *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), which establishes that *Parratt* does not bar a suit under § 1983 where an "established state procedure" destroys an entitlement without affording proper procedural safeguards. *Id.* at 436.

Clause *provided, of course, that adequate state post-deprivation remedies are available.*" *Id.* at 3204 (emphasis added). The Court found that both lower courts had held that the prisoner's claim would not be barred by sovereign immunity and that the prisoner "candidly acknowledges" that a Virginia trial court probably would rule that there should be no immunity. *Id.* at 3206.

The Court's approach in both *Parratt* and *Hudson* creates a sensible and workable distinction between categories of constitutional claims. When a prisoner alleges that at the time officials acted they violated a federal right, the Court will ignore the availability of state remedies and ask only whether the facts as alleged, if proved, indeed establish that a federal right was affected by actions taken under color of state law.[2]

Parratt and *Hudson* fall into the second category of cases in which officials do not violate federal rights at the time they act—e.g., when they injure property or the person of a prisoner—but, once having acted, they will violate the Due Process Clause if an injury resulting from their actions goes unremedied. In this category of cases, federal courts are concerned with whether the facts alleged, if true, demonstrate that state officials negligently or intentionally injured the person or property of the plaintiff and, if they did, whether the state provides a remedy that is sufficient to satisfy the demands of Due Process.[3]

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[2] Because the Court ignores state law, it has not required exhaustion of state remedies prior to the bringing of the federal action. *See, e.g., Patsy* v. *Board of Regents*, 457 U.S. 496 (1982) and cases cited therein at 457 U.S. 500.

[3] It is true that neither *Parratt* nor *Hudson* indicates whether all negligent or intentional acts resulting in harm to prisoners or others

B. There Is No Valid Reason To Treat Injuries To The Person Less Favorably Than Injuries To Property.

The court of appeals in the instant case held by a 5-4 vote that the state would not deny petitioner Due Process if it failed to provide a remedy for injuries resulting to petitioner from the negligence of an officer acting under color of state law. Certainly, nothing in *Parratt* or *Hudson* suggested that property interests were to be preferred to liberty interests, and every other court of appeals that has considered the point has reached a conclusion opposed to the one reached by the majority of the court of appeals below.[4]

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requires a post-deprivation remedy or whether the decisions are to be limited. In the final section of this first argument, petitioner suggests the reason why prisoners have a particular need for remedies and that it would be appropriate for the Court to limit the requirement of post-deprivation remedies to special circumstances.

[4] *See, e.g., Davidson* v. *O'Lone*, 752 F.2d 817, 822 (3d Cir. 1984) (en banc) (prisoner's freedom for harm to person is a protected interest, *Wilson* v. *Beebe*, 743 F.2d 342 (6th Cir. 1984) (bodily injuries received due to state trooper's negligence are liberty deprivations); *Thibodeaux* v. *Bordelon*, 740 F.2d 329 (5th Cir. 1984) (injuries suffered by pretrial detainee due to city officials' negligence are liberty deprivations); *Brandon* v. *Allen*, 719 F.2d 151 (6th Cir. 1983) (damages for injuries received due to police director's negligence in preventing an assault are not recoverable due to qualified immunity), *rev'd sub nom., Brandon* v. *Holt*, 105 S.Ct. 873 (1985); *Haygood* v. *Younger*, 718 F.2d 1472 (9th Cir. 1983), *rehearing en banc granted*, 729 F.2d 613 (1984) (extended prison term due to official's negligence in calculating sentence is a liberty deprivation). *See also Holmes* v. *Ward*, 566 F.Supp. 863 (E.D.N.Y. 1983) (injuries received after prison officers negligently failed to separate inmates represents a liberty deprivation). *See also Junker* v. *Tinney*, 549 F.Supp. 574 (D. Md. 1982) (burns received by inmate due to prison officials' negligence are liberty deprivations).

Judge Phillips, joined by three other judges, dissented and made the following points:[5]

> I do not believe that the critical principles that emerged from *Parratt* can be read as being narrowly confined to property interests. It is true that the case was about a property interest so that the specific holding is so limited, but the threshold issue identified and addressed in the majority opinion was "whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532. And this issue was answered affirmatively . . . .
>
> All of the other Justices writing in the case assumed that a necessary implication of the majority's holding on this point was that it applied to liberty as well as property interests . . . .
>
> . . . I simply cannot accept the [court of appeals'] majority's apparent holding that somehow the fourteenth amendment imposes a more stringent duty

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[5] The only lower court case which has found that a deprivation alleged to have resulted from the negligence of state officials did not amount to a liberty interest within the potential scope of § 1983 (depending on whether a meaningful post-deprivation remedy exists in state court) is *Jackson* v. *City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1325 (1984). This case is plainly distinguishable from the *en banc* court's holding below and supports the dissenters in the court of appeals. In *Jackson*, the court held that a death that occurred after state officials negligently assisted a rescue is not a constitutional deprivation. 715 F.2d at 1206. The court stressed that the victim's own actions, wrecking her car, caused the harm, not the officials' failure to rescue. *Id.* at 1204. It reasoned that only "negative" liberty deprivations—the right to be left alone—as opposed to "positive" liberty deprivations—the right to receive protective services—are protected by the due process clause. *Id.* at 1203-04. Justices White and Rehnquist dissented from the denial of the petition for certiorari. 104 S.Ct. 1325.

Jackson supports the dissent below in the instant case, since it plainly indicates that negligent infliction of injuries by state officials invades liberty interests.

> upon the states to avoid deprivations of the property than the liberty interests of either their prison inmates or citizens in their free societies. If there is a constitutional scale of values associated with the two kinds of interests, the majority's analysis seems to me to stand on its head the obvious rank order that would be assigned to them. (748 F.2d at 234, 235).

Petitioner urges Judge Phillips' reading of *Parratt* and his reasoning upon this Court. The majority of the court of appeals interpreted this Court's concern about the possibility that every automobile accident involving a state official might become a potential federal action under § 1983 as establishing that this Court meant to include only property and not liberty interests within the protection of the Fourteenth Amendment. 748 F.2d at 231. Petitioner argues that the court of appeals' majority misinterpreted this Court.

The reasoning of the court of appeals' majority is faulty in virtually every respect. The most obvious defect is apparent in the discussion of the automobile accident problem. Under the majority's approach, a person who is injured by a state official might be able to sue for damage to his car, but not to his person. Thus, the fender of a car receives more protection than the body of an individual. Damage to the windshield falls within the purview of the Fourteenth Amendment but serious injury, even death, to a human being does not.

This is not only a strange view of the law, but it also is one that finds no support in anything that this Court actually did or said in *Parratt* or *Hudson*. Moreover, the court of appeals totally ignored the legislative background of § 1983. Its reasoning flies in the face of the legislative history of the statute.

This Court has observed on several occasions—e.g., *Monroe* v. *Pape*, 365 U.S. at 170-82; *Mitchum* v. *Foster*,

407 U.S. 225, 238-42 (1972)—that the statute was enacted during the reconstruction period as part of a federal effort to guarantee basic federal rights against state power. The opinions of this Court have repeatedly noted that § 1983 was enacted to enforce the Fourteenth Amendment against state action, whether that action was legislative, executive or judicial. See, e.g., *Mitchum* v. *Foster*, 407 U.S., at 240, *citing Ex Parte Virginia*, 100 U.S. 339, 346. That history emphasized the importance of protecting people. Part of the protection surely went to protecting people's enjoyment of their property, but the core of the protection was directed at individuals who were subject to harassment by the Ku Klux Klan and to denial of the protection of the law. See *Monroe* v. *Pape*, 365 U.S. at 174.

If the court of appeals' majority is correct, then its reasoning ineluctably applies to intentional torts committed by state officials against prisoners, since the majority held that this Court intended to say only that 42 U.S.C. § 1983 protects the property of prisoners, not their persons. This reading of the statute requires a conclusion that the drafters, who feared that officials operating under color of state law would undermine the rights of individuals and that a federal remedy was necessary to protect every person's constitutional rights, were indifferent to persons who were in the custody of state officials. To accept this reasoning, the Court would have to ignore the legislative history that it has analyzed so frequently since *Monroe* v. *Pape* and for the first time find that the drafters of the statute were really not concerned for the safety and well-being of people; the Court would have to conclude that they only wanted to protect property. No such reading of the history of § 1983 is reasonable. It amounts to a virtually complete

misrepresentation of the concerns that led to the passage of the statute.

The reading given the statute by the court of appeals is belied by its plain language. Section 1983 protects "rights, privileges and immunities." It is broadly written. Were it confined to property interests, or were property interests the principal focus of the statute, the word "property" might reasonably be expected to appear in the statute. It is noticeably absent.

It appears, therefore, that the court of appeals' majority misread this Court's opinions in *Parratt* and *Hudson;* that it interpreted the statute without any regard for its history and purpose; that it paid no attention to the plain language of the statute; and that it expressed an unnecessary preference for property over human beings that conflicts with basic notions of fairness and common sense. For these reasons, petitioner urges this Court to reject the holding of the court of appeals and to treat the person and property of a prisoner similarly for purposes of 42 U.S.C. § 1983.

There is another reason why petitioner asks this Court to reject the approach taken by the court of appeals' majority: that approach is bound to make litigation turn on small nuances in pleadings, cause repetitious litigation, and create enormous problems for federal and state courts that seek to accomodate one another in the interests of justice and efficiency. The practical problems with the holding of the majority below can be illustrated by changing the facts of the instant case only slightly.

To make his point, petitioner asks this Court to assume that he had been carrying a hobby kit when he fell on the stairs of his prison. Under the majority's reasoning, peti-

tioner then could sue in federal court to recover for any damage to his property[6] but not to his person.

The majority's approach will force courts to decide whether a given claim is actually a liberty or a property claim. Petitioner's case is a good illustration. The majority assumed that it was a pure liberty claim, but this is not necessarily so. To the extent that damages for personal injuries are intended to offset future medical expenses, they appear to be in the nature of property as well as liberty. Would the court of appeals' majority limit a federal lawsuit to pain and suffering damages and deny recovery for future medical expenses? The answer is unclear.

Also unclear is how the court of appeals would treat such cases as *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, and *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). This Court spoke in *Zimmerman* about an entitlement interest which it described as a property interest. 418 U.S. at 436. In *Wolff*, this Court spoke of a state-created right to good time credit as a liberty interest. It appears it will not always be clear whether a state-created expectancy is best described as a liberty or property interest. Unless the approach of the majority below is adopted, there is no reason to require federal courts to attempt to split hairs in order to attach one label or another to an expectancy interest. The majority's approach not only would burden federal courts unnecessarily, but it also would invite litigants to attempt by careful pleadings to describe an entitlement as a property interest in order to proceed under § 1983.

These additional reasons argue against the approach taken by the majority in the court of appeals.

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[6] This assumes, to use the words of *Hudson*, "that adequate state post-deprivation remedies are [not] available."

C. No Distinction Should Be Drawn Between Intentional And Negligent Acts.

Although the court of appeals did not draw a line between negligent and intentional actions by state officials, petitioner believes that this Court might well address such a line since two Justices appeared to oppose recognition under § 1983 of claims resting on allegations of negligent acts in *Parratt*—e.g., 408 U.S. at 544-45 (Stewart, J. concurring); 408 U.S. at 546-54 (Powell, J., concurring in the result)—and one lower court[7] has indicated that it does not believe that this Court meant to say what it did in *Parratt*.

There are four reasons why petitioner urges that this Court reject any proposed distinction between negligent and intentional acts. First and most important is the reason given by Justice Rehnquist in his majority opinion in *Parratt*: Nothing in the language or legislative history of § 1983 suggests that it was intended to apply solely to intentional deprivations. 451 U.S. at 534.

Second, were the Court to recognize the distinction, litigants almost certainly would respond by alleging in as many cases as possible that harm resulted from intentional actions by state officials. Under the facts of *Parratt*, for example, the plaintiff, by alleging that his hobby kit had been received and held by state officers who could not explain its disappearance, might have been able to allege sufficient facts to support a claim that the kit was intentionally taken. Certainly, he could have

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[7] *Davidson* v. *O'Lone*, 752 F.2d 817 (3d Cir. 1984) (en banc).

pleaded in the alternative that the kit was either intentionally taken or negligently lost.

The instant case affords another example. Petitioner could have alleged that a pillow was left on the stairs with the intention of harming him. Since intent is a subjective concept, in many cases a trial would be necessary to resolve the question whether there was an intent to commit harm. Should the court find at the end of a trial that there was no intentional tort but that there was negligence, it would have to choose between two unsatisfactory alternatives: either dismissing the complaint and thereby indicating that the trial should not have been held in the first place, or granting relief to the plaintiff and thus providing a remedy for damages which is not supposed to be available. Issues also would arise as to whether gross negligence or recklessness is sufficient to support a § 1983 claim.[8] The distinction would in the long run engender disputes about what is fairly pleaded and how to distinguish intentional acts from negligent ones. In the end § 1983 would be a greater burden on federal courts than it is at the present time.

Third, it is almost certain that some negligence claims are within § 1983. For example, if a state failed to comply with the procedural requirements that this Court established in *Wolff* v. *McDonnell*, 418 U.S. 539, for depriving an inmate of good time credit and caused an inmate to serve extra time in prison, that prisoner almost certainly would have a cause of action under § 1983. Once this Court establishes that a person has a right to a pre-

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[8] The Third Circuit gave an affirmative answer in *Davidson* v. *O'Lone*, 752 F.2d 817.

deprivation hearing, a failure to provide that hearing would seem to support a suit under § 1983. The Court has indicated that once a constitutional right is plainly recognized, a § 1983 action will lie against state officials who invade that right. This appears to be the plain meaning of the Court in *Procunier* v. *Navarette*, 434 U.S. at 860.

Petitioner believes that *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, would support the action even if the state's failure to comply were the result of negligence on the part of officials rather than intentional conduct.[9] In that case, the Court found that a § 1983 action would lie where a protected interest was invaded as a result of an "inadvertant" mistake. *Id.* at 426.

Thus, there is nothing in the language or legislative history of § 1983 to suggest that a distinction between negligent and intentional acts was intended by its drafters, and there is good reason to conclude that certain negligence based conduct is undoubtedly within the reach of the statute.

Fourth, there is no need for this Court to create an artificial line between negligence and intentional conduct in order to assure that state courts may have principal jurisdiction over simple tort cases brought against state officials. As long as a state provides a meaningful state remedy, all such cases—i.e., involving intentional conduct and negligence, and involving personal injury and property damage—will be heard exclusively in state court.

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[9] *See also Gregory* v. *Town of Pittsfield*, No. 84-5720, February 25, 1985 (O'Connor, J., dissenting from the denial of certiorari).

D. In Analyzing The Second Essential Element Of A § 1983 Action As Identified By The Court In *Parratt* v. *Taylor* And In Deciding Whether A Constitutionally Protected Interest Is Involved In a Case, Federal Courts May Find Liberty Interests To Be Protected That Are Grounded In Federal, Not State, Law; One Such Interest Is The Right To Personal Safety While In The Custody Of State Officers.

This Court has identified the second essential element of a § 1983 action as focusing on whether the conduct of an officer acting under color of state law deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt*, *supra* 451 U.S. at 534. In previous cases, the Court has indicated that the existence of a property interest often depends on state law. See, e.g., *Board of Regents* v. *Roth*, 408 U.S. at 576-78. In *Parratt* the Court noted that the plaintiff had a right to receive his hobby kit after he was removed from segregation. In *Hudson* the Court assumed that the plaintiff had a right to have certain property in his cell.

Since the rights of prisoners may depend on the statutes and regulations that govern prisons—e.g., *Olim* v. *Wakinekona*, 461 U.S. 238 (1983); *Hewitt* v. *Helms*, 459 U.S. 460 (1983)—it is possible that prison officials might be able to bar prisoners from keeping hobby kits and other personal material in their possession while they are in prison. Assuming that such a bar might be valid if it did not trespass upon First Amendment rights—e.g., *Procunier* v. *Navarette*, 434 U.S. 855; *Bell* v. *Wolfish*, 441 U.S. 520, 553-55 (1979)—or deny fair access to the courts—e.g., *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Bounds* v. *Smith*, 430 U.S. 817 (1977)—a prisoner would have no constitutionally protected interest in his property in prison. A state might choose to permit prisoners to have certain property "at their own risk" in order to

remove from the government any burden of protecting the property. It is not yet plain whether this Court would sustain a regime in which a prisoner would be permitted to keep property that is not constitutionally required to be allowed in prison on the condition that the prisoner agreed to assume any risk of damage to or loss of the property. Petitioner notes that no such regime existed in either *Parratt* or *Hudson*.

Moreover, even if a state could establish an "at your own risk" policy or bar certain property from being kept by prisoners, it cannot escape its responsibility for protecting the person of a prisoner who is involuntarily confined as a punishment for criminal acts. This is the one essential difference between liberty and property insofar as suits for damages arising from tortious conduct by state prison officials are concerned.

Whereas property interests are generally created by force of statute or regulation and often depend upon state law, there are liberty interests that are supported by federal law and that warrant constitutional protection. One such interest is the security of a person who is confined by and is totally under the control of the state. The state may not abdicate its responsibility for protecting the people whom it deprives of liberty and places in custodial confinement.

Immediately after the Civil War, the Thirteenth Amendment was ratified. It provided that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and that "Congress shall have power to enforce this article by appropriate legislation." Three years later, in 1868, the Fourteenth Amendment was adopted. Section 1983 was originally

proposed in 1866 and enacted in 1871. Prior to the enactment of § 1983, the Reconstruction Congress enacted the Civil Rights Act of 1866, which provided in its first section that "all persons born in the United states and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens of every race and color . . . shall be subject to like punishment, pains, and penalties, and to none other, any law statute, ordinance, regulation, or custom to the contrary notwithstanding." This Court has noted that the 1866 statute was enacted to enforce the Thirteenth Amendment. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

The Congress that enacted the 1866 and 1871 statutes was concerned not only about the Klan, but also about "law enforcement agencies of the Southern States." *Allen* v. *McCurry*, 449 U.S. 90, 98 (1980). This is one reason Congress extended the writ of habeas corpus to state prisoners in 1867. *Id.* It is inconceivable that the Congress would have been concerned with the manner in which the states tried and convicted defendants but indifferent to whether the state protected their safety once the prisoners were in state custody—custody which the Thirteenth Amendment recognized as legalized servitude. Petitioner argues that the Congress in 1866 and in 1871 understood that state officers who had complete control over another person had a responsibility for protecting that person and that this responsibility is part of the Due Process that is guaranteed by the Fourteenth Amendment.

This Court recognized the general understanding as to the responsibilities of a custodial officer in *South* v. *Maryland*, 59 U.S. 396 (1856). In that case Maryland sued various individuals, including South, a county sheriff, to recover on behalf of an injured citizen money extorted from him in South's county when South declined to pro-

tect the citizen. Although the court found that no cause of action had been stated under the circumstances, it had occasion to discuss the "four distinct classes" of duties of a sheriff. *Id.* at 401. The Court described the fourth class as follows:

> In his ministerial capacity he is bound to execute all processes issuing from the courts of justice. He is keeper of the county jail, and answerable for the safe-keeping of prisoners. He summons and returns juries, arrests, imprisons, and executes the sentence of the court. . . . (*Id.* at 402).

The Court described the common law approach to liability of a sheriff:

> It is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals, for a compensation in fees or salary, he is liable for acts of misfeasance or non-feasance to the party who is injured by them.
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> . . .
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> The history of the law for centuries proves this to be the case. Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. . . . (*Id.* at 402-03).

This remained the common law throughout the nineteenth century. For example, in *State ex rel. Tyler* v. *Gobin*, 94 Fed. 48 (1899), the court stated that "as the lawful custodian of the deceased, he [the sheriff] owed to him the duty of exercising ordinary and reasonable care for his life and health. This duty was due to the deceased personally, and is additional to the duty of safe-keeping which he owes to the public. This duty arose from his having the person of the deceased committed to his custody by virtue of his office." *Id.* at 50.

Although the Thirteenth Amendment recognized that punishment for crime was an acceptable form of involuntary servitude, the Fourteenth Amendment guaranteed that no person would be deprived of liberty without Due Process. Section 1983 enforced the guarantee of the Fourteenth Amendment. This Court has observed that one of the complaints giving rise to § 1983 was that "[s]heriffs, having eyes to see, see not. . . ." *Mitchum* v. *Foster*, 407 U.S. at 225. It is inconceivable that the drafters of § 1983 would have intended to give state officers power over prisoners and deny those prisoners federal protection of their persons and their safety where no state remedy provided protection.

This Court's decision in *Screws* v. *United States*, 325 U.S. 91 (1945), supports petitioner's assertion that the drafters of § 1983 intended that state prisoners would be protected by those responsible for their custody. A majority of the Court, without a majority opinion, assumed that a criminal complaint under the criminal counterpart to § 1983, 18 U.S.C. § 52[10], which charged officials *inter alia* with willfully depriving a person of life without due process, stated an offense. The Court construed the statute to avoid vagueness, but it did not question that a person's right to be protected in his enjoyment of his life (and *a fortiori* liberty) is constitutionally protected when that person is in the custody of officers acting under color of state law. Of course, the conduct in *Screws* was allegedly intentional. But, if this Court concludes, as petitioner urges, that the drafters of § 1983 did not intend to distinguish between kinds of tortious conduct, then *Screws* is important because it recognizes the duty to protect a person in official custody.

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[10] This statute is now 18 U.S.C. § 242.

This Court has continued to recognize the right of a person in special state custody to be free from tortious injury. See, e.g., *Youngberg* v. *Romeo*, 457 U.S. 307, 315-16 (1982); *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977). More generally, the Court has recognized that individuals have liberty interests grounded in federal law. See, e.g., *Vitek* v. *Jones*, 445 U.S. 480, 490-91 (1980).

Thus, petitioner asks this Court to do no more than continue to assure that the state protect those whom it incarcerates by exercising reasonable care to assure their safety.[11] This is the constitutional minimum that any person is entitled to expect and it is part of Due Process.

If this Court continues to recognize that a special duty is owed to one who is in complete control of the state, it may distinguish claims by persons who have no special relationship and no special right to demand protection of their persons. This distinction would help to explain why a prisoner who suffers tortious injuries to his person at the hands of state officers has a right to an adequate remedy whereas other persons may have no such constitutionally guaranteed right to a remedy against arguably tortious conduct by state officials. See, e.g., *Paul* v. *Davis*, 424 U.S. 693 (1976); *Martinez* v. *California*, 444 U.S. 277 (1980).[12]

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[11] Lower federal courts have referred to the relationship between the officer and those in custody as a "special" one. *See, e.g., Wright* v. *City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983). The special relationship is recognized in the RESTATEMENT OF TORTS Second, Vol. 2, § 314A (1965).

[12] This distinction is consistent with the Court's reasoning in *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The Court quoted with approval a state court decision stating that "[i]t is but just that the public be required to care for the prisoner who cannot by reason of the deprivation of his liberty, care for himself." *Id.* at 104. Although the Court

II. THERE IS NO GREATER REASON TO READ § 1983 AS PROVIDING A FEDERAL REMEDY FOR A LIBERTY DEPRIVATION THAN FOR A PROPERTY DEPRIVATION AS LONG AS STATE COURTS AFFORD ADEQUATE, MEANINGFUL REMEDIES FOR DEPRIVATIONS OF BOTH LIBERTY AND PROPERTY.

In his first argument petitioner maintained that liberty interests are entitled to at least the same respect as property interests under § 1983. The question addressed in this second argument is whether liberty interests are so much more important than property interests that a prisoner should be entitled to sue under § 1983 even though a meaningful remedy might be available in state court for tortious conduct of state officials.

There is nothing in the language of § 1983 or in its history to suggest that liberty and property were distinguished by the drafters in a way that would permit a person to sue for a liberty deprivation in federal court but not for a property deprivation which resulted from identical tortious conduct. Indeed, the history of the statute, as noted by this Court in opinions cited above, indicates that the drafters of § 1983 were concerned with the Ku Klux Klan and its looting, burnings and lynchings. In enacting § 1983, the Congress provided protection for property and for people. It is doubtful that the Congress would have wanted to provide a federal forum for a plaintiff to complain that he had been deprived of liberty without

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declined to hold that every claim by a prisoner that he has not received adequate medical care states a violation of the Eighth Amendment, it was careful to note that the state had assured the Court that Texas law permitted prisoners to bring state claims for malpractice by prison physicians. Thus, this Court actually held only that no claim may be brought under § 1983 simply on the basis of negligence for which the state provides a remedy.

Due Process and deny that plaintiff a forum to claim that he also had been deprived of property by the same or similar official acts which deprived him of liberty.

This Court's reading of the legislative history of § 1983 in *Allen* v. *McCurry*, 449 U.S. 90, would appear to reject a view that liberty interests were intended to receive different treatment from property interests. In that case, a defendant in a state court criminal trial filed an action under § 1983 after losing a motion to suppress in the criminal proceeding. This Court held that the doctrine of collateral estoppel barred his federal suit. Although the action involved a claim that state officers had invaded a constitutionally protected expectation of privacy (i.e., protected by the Fourth and Fourteenth Amendments), this Court observed that a "roughly contemporaneous" statute extended the federal writ of habeas corpus to state prisoners and rendered "null and void" state proceedings inconsistent with the decision of a federal habeas corpus court, whereas there was no similar statute suggesting that federal courts should not respect state judgments when constitutional claims have been recognized and fair procedures for determining them have been provided. *Id.* at 98-99 & n.12.

A defendant in McCurry's position has every reason to raise his search and seizure claim in state court, since a failure to raise it will almost surely be a waiver of the claim under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), for purposes of the criminal case. If the defendant raises the claim and loses it, he cannot obtain federal review by way of habeas corpus in most instances. *Stone* v. *Powell*, 428 U.S. 465 (1976). *Allen* v. *McCurry* recognizes the position the defendant is in, but declines to find that a federal forum is necessary for a fair determination of a claim that liberty interests protected by the Fourth and Fourteenth

Amendments have been violated. If a federal forum is not necessary to vindicate such a claim, petitioner believes that § 1983 does not require a federal forum for protection of other interests as long as the state provides adequate, meaningful remedies in state courts.[13]

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[13] Some circuits hold that liberty deprivations attributable to alleged misconduct on the part of state officers give rise to § 1983 actions only if a state fails to provide a meaningful remedy by way of a post-deprivation hearing. *See, e.g., Thibodeaux* v. *Bordelon*, 740 F.2d 329, 336 (5th Cir. 1984) (*Parratt* applies to negligent deprivations of liberty); *Augustine* v. *Doe*, 740 F.2d 322, 327 (5th Cir. 1984) ("finding [a liberty] deprivation, the court must then determine whether the state procedures available for challenging the deprivation satisfy the requirements of due process"); *Gilmere* v. *City of Atlanta*, 737 F.2d 894, 905 (11th Cir. 1984) (court must decide if state's tort remedies satisfy procedural due process requirements); *Haygood* v. *Younger*, 718 F.2d 1472, 1480 (9th Cir. 1983) (distinction between liberty and property is unimportant), *rehearing en banc granted*, 729 F.2d 613 (1984); *Rutledge* v. *Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981) ("*Parratt* . . . provides the guidance [for liberty deprivations] we must accept"), *aff'd on other grounds sub nom., Kush* v. *Rutledge*, 460 U.S. 719 (1983).

Other circuits have refused to extend *Parratt* v. *Taylor* to some or all liberty deprivations. *See, e.g., Wilson* v. *Beebe*, 743 F.2d 342, 348 (6th Cir. 1984) ("*Parratt* has no application where a negligent deprivation of life or liberty has been alleged"); *Vail* v. *Board of Education*, 706 F.2d 1435, 1441 (7th Cir. 1983) (*Parratt* does not control for intentional deprivations of liberty and property), *cert. denied*, 104 S.Ct. 2144 (1984); *Brewer* v. *Blackwell*, 692 F.2d 387, 395 (5th Cir. 1982) ("[W]e decline to give *Parratt* the sweeping interpretation required to encompass the intentional deprivation of liberty involved in this case"); *Wakinekona* v. *Olim*, 664 F.2d 708, 715 (9th Cir. 1981) (*Parratt* does not apply to liberty interests), *rev'd on other grounds*, 461 U.S. 238 (1983).

III. NO MEANINGFUL REMEDY IS CURRENTLY AVAILABLE IN VIRGINIA STATE COURTS FOR NEGLIGENT CONDUCT BY A STATE OFFICER WHO IS NOT BOUND BY STATUTE OR REGULATION TO ACT IN A SPECIFIC WAY.

Throughout this litigation respondent has indicated that he would assert a sovereign immunity defense in state court as well as in federal court. At every stage of the proceedings, respondent has reiterated an intent to rely on sovereign immunity as a defense and an unwillingness to waive the defense. In fact, counsel for respondent was specifically asked by the en banc court of appeals whether respondent was willing to forego reliance on the defense in state court, and counsel gave a negative answer. See *Ausley* v. *Mitchell*, 748 F.2d 224, 227 n.1 (4th Cir. 1984) (en banc) (Winter, C.J., concurring in part) (companion case to petitioner's).

The Attorney General of Virginia joined the brief for respondent in the court of appeals and expressed no doubts concerning the sovereign immunity defense. Assuming that counsel for respondent have proceeded in good faith, they must believe that the sovereign immunity defense is sound. Yet, respondent claims that petitioner nevertheless has an adequate remedy in state court.[14]

If sovereign immunity does apply to this case and no federal action is permitted, then it is plain that petitioner would be denied any protection for his person against tortious acts by state officers—i.e., state courts would

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[14] *Davidson* v. *O'Lone*, 752 F.2d 817, 822 (3d Cir. 1984) (en banc), appears to have reached the opposite conclusion and accepted the argument that sovereign immunity would negate a meaningful remedy and not satisfy due process where a constitutionally protected interest is involved.

provide no remedy and federal courts would deny him a cause of action under § 1983. This would deny petitioner the protection that the drafters of § 1983 intended him to have.

This Court has recognized that the fact that a state court is theoretically available to provide justice does not mean that it is actually available. In *Allen* v. *McCurry*, 449 U.S. at 101, for example, Justice Stewart's opinion for the Court opines that an exception to the holding that federal courts will give collateral estoppel effect to state judgments might be recognized "where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to acknowledge the existence of the constitutional principle on which a litigant based his claim." When the Court held in *Parratt* that a prisoner could not sue under § 1983 for negligent deprivation of property, it limited its holding to situations in which a state provided a meaningful post-deprivation hearing. 451 U.S. at 527. In *Hudson* the Chief Justice found that a federal action under § 1983 could not be maintained because an adequate state remedy existed. 104 S. Ct. at 3205.

Petitioner contends that if sovereign immunity is a bar to suit, he has no state court remedy. "No remedy" cannot be meaningful or adequate within the meaning of *Parratt* and *Hudson*. "No remedy" leaves petitioner with no fair procedure to protect his liberty.

At the time that suit was filed and to this day it appears that Virginia law may well provide a sovereign immunity defense to the respondent.[15] The breadth of the sovereign immunity doctrine in Virginia is illustrated by *Lawhorne*

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[15] A 6-3 majority of the court of appeals held that petitioner had a meaningful remedy in state court, although no judge on the court of

v. *Harlan*, 214 Va. 495, 200 S.E.2d 569 (1973). The personal representative of a former patient alleged that the patient died as a result of negligence in the treatment and care of his injury at the University of Virginia hospital, an organ of state government. He sued the chief administrator, an assistant administrator, and a surgical intern. The Virginia Supreme Court found all immune from suit. Since even the intern exercised "discretion and judgment" he was beyond the reach of tort remedies. One Justice dissented.

Thereafter, the supreme court decided *James* v. *Jane*, 221 Va. 43, 282 S.E.2d 84 (1980), which for a brief time afforded persons injured at the hands of state employees or agents hope that a remedy might be available. James sued to recover for personal injuries suffered in connection with an alleged negligent administration of a myelogram. Another plaintiff, Lawrence, sued to recover damages for a negligent operation. Each defendant was a full time member of the faculty of the University of Virginia Medical School at the time of the alleged negligence. The supreme court reiterated its reasoning in *Lawhorne* that "the use of judgment and discretion" are important to a determination of whether a defendant may claim sovereign immunity. It added another consideration: "the degree of control by the state over the employee whose negligence is involved." It found that there was no immunity because the state's involvement in the treatment of private patients was slight and the doctors were acting in the very same capacities as doctors in private hospitals.

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appeals actually could cite authority establishing that petitioner could reasonably expect to defeat the sovereign immunity defense as it had been recognized by modern decisions of the Virginia Supreme Court.

The court soon made it clear, however, that *James* v. *Jane* was not intended to cut back on the immunity that most state employees could claim. In *Banks* v. *Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982), the court held that a high school student could not sue a division superintendent of schools or a high school principal for negligently failing to protect her safety. The student was cut and stabbed by another student during school hours. The court noted that the defendants had a large number of discretionary and managerial functions in the school and thus were entitled to immunity. Three Justices dissented and argued that the decision could not be reconciled with *James* and that the bench and bar had no consistent rule to follow.

The next year the court decided two cases of significance. The first was *Bowers* v. *Commonwealth*, 225 Va. 245, 302 S.E.2d 511 (1983). The plaintiff sustained injuries when he fell through a culvert-type bridge operated by the State Department of Highways on property that the plaintiff leased. The court rejected the idea that *James* applied and concluded that *James* emphasized that the doctors were essentially private practitioners. 302 S.E.2d at 515. Thus, it found that the resident engineer in charge of the bridge was immune from suit. Six months later in *Hinchey* v. *Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983), the court held that a plaintiff who was injured in an automobile accident could not sue the Superintendent of the Expressway where the action occurred. The court reasoned that even if no state funds were at risk in the case, the plaintiff should not be permitted to sue since suits burdened the state in its governmental function. Not only did the court take an expansive approach to sovereign immunity, but it also stated that "the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from

acting or compelling it to act." 307 S.E.2d at 894. Two Justices dissented and argued that the court's opinions made "an immunity-liability patchwork" of the tort law of Virginia. 307 S.E.2d at 895.

One year later, in *Messina* v. *Burden*, ___ Va. ___, 321 S.E.2d 657 (1984), the court upheld sovereign immunity in an action that is similar to petitioner's case. Messina sued when he tripped and fell on a stairway behind the stage of a college theater. His suit was against the Superintendent of Buildings whose duty it was to maintain and supervise the maintenance of the theater. Another plaintiff sued an official for his injuries when he stepped on a defective manhole cover on a public street. The court rejected attacks on sovereign immunity and boldly declared that the doctrine is "alive and well" in Virginia. Its opinion offers the most expansive language in recent years in explaining the doctrine of sovereign immunity as resting not only on a desire to protect the public purse and avoid litigation, but also on a desire to assure "that citizens will be willing to take public jobs." 321 S.E.2d at 660. Once again the court emphasized the criteria of judgment and discretion in finding that immunity barred suit. Two Justices dissented and argued that "the tent of sovereign immunity is now to be stretched to protect from liability more negligent individuals than ever before. What appears to be the critical test is whether the employee of an immune employer was acting within or without the scope of his employment." *Id.* at 665.[16]

These decisions demonstrate that sovereign immunity is indeed "alive and well" in Virginia. Aside from doctors

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[16] During this entire period, the court decided only one case, *First Virginia Bank-Colonial* v. *Baker*, 225 Va. 72, 301 S.E.2d 8 (1983), in which it rejected a claim of sovereign immunity. A deputy clerk had negligently indexed a deed of trust on the wrong page of an index

who act as private physicians, it appears that virtually any state employee who is called upon to exercise any judgment at all may be immune from suit. Moreover, the immunity now appears to extend to equitable as well as legal claims. It is no wonder that respondent declines to abandon the defense in any state court action.

Respondent may well have exercised some judgment and some discretion in his supervision of stairs at the jail.* But if sovereign immunity bars all actions when state officials are called upon to think, it provides no remedy at all in most cases. A defense as broad as the Virginia sovereign immunity defense is a far cry from the qualified immunity that this Court has recognized. See, e.g., *Procunier* v. *Navarette*, 434 U.S. at 861. The fact is that the state denies relief in precisely those situations in which a reasonable person should not have acted as the defendant did. It falls far short of assuring that reasonable care will be taken to protect the person of an individual who is entrusted to the custody of the state. Thus, it is neither a meaningful nor an adequate remedy.

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book. No one claimed that the negligent act was protected by sovereign immunity; the only question was whether the clerk could be liable for the acts of a deputy. The court found that if the deputy was liable the clerk could be liable under the respondeat superior doctrine.

IV. TO AVOID WASTING SCARCE JUDICIAL RESOURCES AND TO ASSURE THAT A MEANINGFUL, ADEQUATE REMEDY IS PROVIDED FOR PRISONERS WHOSE PROTECTED LIBERTY AND PROPERTY INTERESTS ARE DAMAGED BY TORTIOUS CONDUCT ON THE PART OF OFFICIALS ACTING UNDER COLOR OF STATE LAW, FEDERAL COURTS SHOULD ENTERTAIN ACTIONS UNDER § 1983 WHEN A DEFENSE OF SOVEREIGN IMMUNITY IS RAISED IN STATE COURT UNLESS A DEFENDANT ABANDONS HIS SOVEREIGN IMMUNITY DEFENSE OR THE STATE PROVIDES AN IMMEDIATE AND FINAL MEANS FOR A PLAINTIFF TO ASSURE THAT THE DEFENSE IS UNAVAILABLE.

Petitioner argued in the court of appeals that he might not be heard on the merits in state court because of the doctrine of sovereign immunity, and he asserted that he would litigate in state court but for the sovereign immunity problem. He argued that he would have to exhaust the entire appeals process in state court to overcome the defense and that he therefore had no adequate state remedy. For that reason he sought to proceed under § 1983.

Petitioner argues that it is a bad thing for both state and federal courts if, when a suit is filed under § 1983, a federal court is unable to ascertain whether there is jurisdiction. Is the federal court bound to await the outcome of state proceedings? If so, the dockets of the federal courts may become cluttered with stale cases. It might take years for the state court system to finally rule that sovereign immunity is a defense to a state action. During those years the federal claim would become old. This would be bad for the court system and a poor way to vindicate the right of prisoners to be protected by the officers entrusted with their safety.

This case is a good example of the problem. Years will have passed between the time petitioner was injured and the time when this Court will finally decide petitioner's case. In the interim, respondent has adhered to his sovereign immunity defense. Petitioner has taken respondent at his word and assumed that no remedy would be available in state court; thus, he has sought to keep his (1983) claim alive. He has attempted to avoid having to litigate the same case in two courts.

This is not a unique case. Every prison inmate similarly situated to petitioner may be required to litigate in both state and federal courts simultaneously as a result of state sovereign immunity law. Otherwise, the failure to bring a prompt federal claim might result in the running of the statute of limitations. See *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980).[17] Unless a federal court is able to make a determination as to the propriety of an action under § 1983 at the beginning of a suit, scarce judicial resources, both federal and state, will be wasted. And prisoner plaintiffs will be bounced between federal and state courts with neither anxious to proceed to resolve

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[17] 2 Code of Virginia, § 8.01-243 (1984 Replacement Vol.) established a two year statute of limitations for personal injuries. *See Burnett* v. *Grattan*, ___ U.S. ___, 104 S.Ct. 2924, 2928-33 (1984) (discussing applicability of state statute to federal actions). Section 8.01-2 declares that "a person convicted of a felony during the period he is confined" is a "person under a disability." Generally, such a person must sue by having a guardian ad litem bring the action. (§ 8.01-9). Under previous Virginia law, a prisoner needed a committee to bring an action on his behalf, although the prisoner could waive the appointment of a committee. *Dunn* v. *Terry*, 216 Va. 234, 217 S.E.2d 849 (1975). It is unclear whether the prisoner can sue at the present time without a guardian, and it appears that the statute of limitations is not tolled during the period when a prisoner has no guardian or when an action is pending in another court. (§ 8.01-229).

complaints that liberty and property have been damaged.[18]

The wasted resources associated with uncertainty are self-evident. Lower courts have struggled to find a solution. One example is *Brooks* v. *Dutton*, 751 F.2d 197 (6th Cir. 1985). A prisoner complained that his personal property had been taken from his cell while he was hospitalized. He pursued state administrative remedies and filed a federal action. The district court dismissed the complaint as frivolous, and the court of appeals agreed that after *Parratt* the complaint was frivolous. The court took judicial notice of Tennessee's tort claims procedures, which appeared to provide an adequate remedy. It then held that "if state remedies exist and have not been exhausted, there is no cause of action under § 1983, unless plaintiff pleads and proves that state remedies are inadequate." *Id.* at 199. The problem is that a plaintiff cannot show that the remedies are inadequate in many instances without actually litigating throughout the state court system, while keeping a federal claim in reserve in case the remedies are, in fact, inadequate.

Petitioner suggests that when a state has a broad rule of sovereign immunity and that rule is invoked as a defense in a state court action, a federal court should entertain a suit by a prisoner complaining of injuries to person or property attributable to negligent or intentional acts by prison officers unless the sovereign immunity defense is waived when the federal suit is filed, or the state provides some immediate and final means for the plaintiff to assure that the defense will not be honored in state court. As long as a federal court is confident that the

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[18] Even if a suit was heard in state court, a general verdict might not indicate whether a state officer won on the merits or as a result of sovereign immunity. A federal court might have great difficulty in ascertaining whether the plaintiff had a meaningful remedy.

immunity defense will not be recognized in state court and that the state action may proceed, the federal action may and should be dismissed.

There are many ways for a state to provide definite rules regarding sovereign immunity. Statutes or regulations could provide that certain classes of employees are not immune from suit for negligent acts. Sovereign immunity could be abrogated altogether or in large part.[19] The state could provide that sovereign immunity may only be raised if approved by the Attorney-General, who would have to decide whether or not to permit the defense at the time a federal action is filed. Such a determination could be made final and binding on state employees.

If a prisoner's right to be secure in his person is to be protected, a remedy must be available at a meaningful time. A meaningful remedy is one that is proximately related to the events giving rise to it. The burden should be on the state official who claims that there is a meaningful, adequate state remedy to demonstrate that there is. Unless the official does so, the federal action should proceed.

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[19] Virginia has adopted a tort claims act. Va. Code § 8.01-195.1 et seq. (1984 Replacement Vol.). It will permit some, but not all actions, that would have been barred by sovereign immunity. It has no application to acts occuring before July 1, 1982. The statute limits claims to $25,000 and preserves the sovereign immunity of individuals that has been created by the Virginia Supreme Court. (§ 8.01-195.3). The act should offer clear guidance in some suits. But there is a real danger that the act could be amended to exclude suits by prisoners should this Court hold, as the court of appeals did, that a state has no obligation to provide a remedy for personal injuries. It is unclear whether the act included prisoner suits because the state wanted to give prisoners a remedy or because it feared that it had to and preferred, to see the remedy come in state court. Thus, this Court's judgment may well affect the future of the state act.

V. CONCLUSION

Cases like this one should be in state court. But, in a state court respondent would rely upon his sovereign immunity defense. That defense stands in the way of having the merits of the claim heard. Unless the merits can be heard, there is no way for petitioner to hold the state to its duty to protect him while he is in custody.

Petitioner prays that this Court will permit his action to proceed in federal court because the respondent failed, despite having many chances to do so, to abandon a sovereign immunity defense. Without a federal remedy, there is no assurance that petitioner will have an opportunity to be heard on the merits of his claim in state court. This is why petitioner has maintained throughout this litigation that the state has not offered him an adequate, meaningful remedy in state court. Throughout this litigation respondent has asserted that petitioner, in fact, has no right to recover in state court because respondent is immune from suit.

This is a case in which petitioner is entitled to a remedy if he can prove negligence. Unfortunately, it must be a federal remedy under § 1983 because the state cannot assure that a state remedy is available. Thus, petitioner

asks this Court to reverse the judgment of the court of appeals and to remand his case to the district court with directions to consider the merits of the complaint.

Respectfully submitted,

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